

No. 291.

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IN THE  
United States Circuit Court of Appeals.  
FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,

Plaintiffs in Error,

vs.

CHUNG SHEE,

Defendant in Error.

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OPENING BRIEF FOR PLAINTIFFS IN ERROR.

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In Error to the United States District Court,  
Southern District of California.

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**Opening Brief for Plaintiffs in Error.**

STATEMENT OF CASE.

THE facts of this case, necessary to an understanding of the questions of law presented herein, are fully set forth in the written opinion of Judge Wellborn, filed in the court below. (Trans. pp. 7-19.) Briefly, those facts are as follows: In June, 1893, the defendant, a Chinese woman, arrived at the port of San Francisco, on the steamer Peru, from China, and sought admission to the United States under

the name of Chung Shee, on the ground that she was the wife of a Chinese merchant then living in the city of San Francisco. She was examined by the Collector of the Port at San Francisco relative to her right to land, and by him refused permission to land. Thereafter, on July 21, 1893, a writ of *habeas corpus* was issued by Judge Morrow, and the matter referred to a special referee to take testimony and report findings. Upon such examination before the referee, she testified that she was the wife of a Chinese merchant in San Francisco, named Woo Yow; that she had formerly lived with him in San Francisco, and had had a child by her alleged husband. The alleged husband also testified at the examination. The testimony, it seems, was very conflicting. The alleged wife, the defendant in error, testified as to the sex of her alleged child, and her alleged husband testified that this child's sex was the very opposite of that as testified to by defendant in error. The special referee reported against the defendant's right to land, and thereafter, on August 1st, 1893, Judge Hawley, sitting as Judge of the District Court of the Northern District of California, made an order directing the return of said Chung Shee to the steamer Peru, to be hence taken to Hong Kong, China, and on August 10th, 1893, the United States Marshal executed Judge Hawley's said

order, by placing said Chung Shee on board the steamship Rio de Janiero, bound for said port of Hong Kong.

In January, 1894, a Chinese woman, under the name of Lum Lin Ying, arrived at the port of Portland, State of Oregon, on the steamship Signal, from the port of Victoria, in British Columbia, and sought admission into the United States at said port of Portland. Said person, Lum Lin Ying, was the defendant herein. The learned judge of the court below, the Honorable Olin Wellborn, has specifically found that the said Chung Shee and the said Lum Lin Ying are one and the same person, and that the defendant is the person who sought and was denied permission to land at San Francisco, and also the same person who sought and was granted permission to land at Portland, Oregon, as hereinafter set forth. (See Tr. p. 8).

On her second attempt to enter the United States, the defendant claimed to be the wife of a Chinese merchant of the city of Portland, named Chung Chew.

Upon her arrival at the port of Portland, in January, 1894, the defendant was examined by the collector of the port, T. J. Black, and after said examination was, by said Collector denied permission to land.

Thereafter, on January 30th, 1894, a petition

within the United States, and that she has been found, and at the date of filing said complaint was, unlawfully within the United States, and that at all the times in said complaint mentioned she was a Chinese laborer. (Tr. pp. 20-31). Thereafter said Commissioner gave, and made and filed his findings and judgment, finding that the defendant was a Chinese laborer unlawfully within the United States, and adjudging that she be removed to China. (Tr. pp. 23-25-32). Thereafter, the defendant appealed from said findings and judgment of said Commissioner to the Honorable Olin Wellborn, United States District Judge for the Southern District of California. (Tr. pp. 1-33). Thereafter the cause, on appeal to said Judge Wellborn, was duly heard, and thereafter, to wit, on the 2nd day of December, 1895, Judge Wellborn filed with the clerk of said District Court for the Southern District of California, his written opinion, and ordered the judgment and order of said Commissioner, Wm. M. VanDyke, to be reversed and the defendant discharged, to which order the United States of America, the plaintiffs in error herein, duly excepted. (Tr. p. 58). This order and judgment of Judge Wellborn, the plaintiffs in error have brought to this court by writ of error. (Tr. p. 2). Judge Wellborn held that the judgment and order of Judge Bellinger in the District Court for the District

of Oregon, adjudging that the defendant should be discharged from the custody in which she was then held, was *res adjudicata*, a final determination of her right to enter the United States, and conclusive of the instant case, and grounded his judgment of reversal upon the proposition that Judge Bellinger's decision in the *habeas corpus* proceedings in the District Court of Oregon could not be collaterally assailed in the instant proceedings, and must be held to establish the lawfulness of the defendant's residence in the United States. (Opinion of Judge Wellborn, Tr. pp .7-19).

Resume: The four essential facts in the case are:

1. The decision of the collector of the port, at San Francisco, in June, 1883, upon the defendant's first attempt to enter the United States, deciding against the right of the defendant to come into the United States;

2. The judgment and decision of Judge Hawley, on August 1st, 1893, in the *habeas corpus* proceedings then pending in the District Court of the Northern District of California, brought to review the decision of the Collector at San Francisco, deciding against the defendant's right to enter the United States, and directing her return to China;

3. The decision of the collector of the port at Portland, Oregon, in January, 1894, upon defendant's second attempt to enter this country, deciding against the defendant's right to come into the United States;

4. The judgment of Judge Bellinger, on February 2nd, 1894, in the *habeas corpus* proceedings pending in the District Court for the District of Oregon, brought to review the decision of the collector at Portland, Oregon, adjudging that the defendant did have the right to enter the United States, and ordering her discharge from custody.

The sole question presented by the record is: Was the decision of Judge Bellinger in the District Court of the District of Oregon, a final and conclusive determination of the defendant's right to be and remain in the United States, precluding any inquiring into that right in the instant action before the Honorable Olin Wellborn, Judge of the District Court for the Southern District of California?

#### SPFCIFICATIONS OF ERROR RELIED UPON.

All of the errors specified in the assignment of errors, (Tr. p. 59), in effect present but the one question, namely: Did the court err in holding that the decision of Judge Bellinger precluded all inquiry into defendant's right to be and remain within the United States?



All of the errors assigned, (which together present but the one question aforesaid), are relied upon and are as follows: (Tr. pp. 59-61).

1. The court erred in not holding that the order and decision of Judge Hawley, in the *habeas corpus* proceedings in the District Court of the United States for the Northern District of California, directing the return of Chung Shee to the steamship Peru, to be hence taken, to Hong Kong, China, was conclusive against the right of the defendant to be and to lawfully remain within the United States.

2. The court erred in holding that Judge Bellinger's judgment and decision in the *habeas corpus* proceeding in the District Court of the United States for the District of Oregon was a conclusive adjudication of the defendant's right to be and lawfully remain within the United States, and conclusive of that right in this action.

3. The court erred in holding that said decision of Judge Bellinger could not be attacked in this action for fraud, and erred in not holding that said decision was inoperative in this action as a conclusive or any determination of defendant's right to be and lawfully remain within the United States, by reason of the fraud practiced by defendant upon Judge Bellinger and the officers of the United States Government.

5. The court erred in not finding and holding that the defendant was an unregistered Chinese "laborer," unlawfully within the United States.

6. The court erred in reversing the judgment and order of the commissioner.

7. The court erred in discharging the defendant from custody, and in adjudging that she was lawfully entitled to be and remain within the United States.

#### POINTS OF LAW.

It is submitted that Judge Bellinger's decision and judgment did not establish any right in the defendant to be and remain in the United States, and was not conclusive of the present case, because :

1. Judge Bellinger's jurisdiction in the *habeas corpus* proceedings, pending in the District Court of the District of Oregon, was limited to an inquiry into the jurisdiction of the collector of the port at Portland, Oregon, to decide that the defendant was not entitled to enter the United States, and—

2. Therefore Judge Bellinger's decision and judgment, if conclusive of anything, is conclusive only of the fact that the collector of the port at Portland, Oregon, did not have jurisdiction to decide against the defendant's right to enter the United States. That is, it is

conclusive of the fact that the particular evidence adduced before the collector did not empower that officer to render a decision denying the defendant's right to enter the United States. The decision of Judge Bellinger was confined, or should have been confined to the particular case made before the collector, and was not an adjudication of the defendant's title to residence in the United States. The jurisdiction of the collector to make the order, and not the defendant's title to residence, was the issue presented before Judge Bellinger. To hold otherwise is to convert the writ of *habeas corpus* into a writ of error, and to give to Judge Bellinger's decision the same force and effect that would be given to the judgment of an appellate court on appeal or error.

#### ARGUMENT.

It is respectfully submitted that the second proposition above set forth follows logically and necessarily from the first proposition, and that the first is abundantly supported by the authorities. In support of said propositions we respectfully call the court's attention to the authorities presently to be cited.

*1st proposition: Judge Bellinger's jurisdiction, in the habeas corpus proceedings before him, was limited to an inquiry into the jurisdiction of the collector to decide against the defendant's right of entry.*

The jurisdiction, or power, of a collector to render a decision against a Chinaman's right of entry, depends upon two conditions:

1st. The existence of some legal and competent evidence, upon which he might base his decision; and 2nd: The sufficiency, in law, of the ultimate facts, deduced from such evidence, to justify the collector's judgment denying permission to enter the United States.

Therefore, when it is said that the inquiry of the court in *habeas corpus* proceedings is limited to an inquiry into the jurisdiction of the collector, we must understand by this proposition that the inquiry of the court is confined to two questions: 1st, Was there any legal and competent evidence before the collector from which to deduce the existence of the ultimate facts upon which his judgment was based, and 2nd: Were these ultimate facts so by him expressly found, or necessarily implied in his decision, sufficient, as a matter of law, to justify his judgment. The first inquiry respects the legality and competency of the evidence adduced before the Collector. The second inquiry respects the sufficiency in law of the ultimate facts found from such evidence, to justify the collector's final judgment against the Chinaman's right of entry.

Of course, in practice, the courts in these Chinese *habeas corpus* cases may, sometimes, go be-

yond the above described limits of their jurisdiction in such cases, and may sometimes, in effect, make an independent inquiry into the Chinaman's alleged right to enter the United States. But it is respectfully submitted that the question here presented is to be determined, not according to what in practice may be customary in such cases, but according to the theoretical limits of the court's jurisdiction in such cases, as laid down by the authorities.

In support of the foregoing statement of the limits of the court's inquiry, according to the strict theory of the law in such cases, we submit the following authorities.

Judge Blatchford, in the *Case of Stupp*, thus states the rule:

“The court issuing the writ, must inquire and adjudge whether the commissioner acquired jurisdiction of the matter by conforming to the requirements of the treaty and the statute; whether he exceeded his jurisdiction; and whether he had any legal or competent evidence of facts before him on which to exercise a judgment as to the criminality of the accused. But such Court is not to inquire whether the legal evidence of facts before the commissioner was sufficient or insufficient to warrant his conclusion. The proper inquiry is to be limited to ascertaining *whether the commissioner had juris-*

*diction*, and did not exceed his jurisdiction, and had before him legal and competent evidence of facts whereon to pass judgment as to the fact of criminality, and did not arbitrarily commit the accused for surrender without any legal evidence.”

Case of Stupp, 12 Blatch; 501, 519.

Nor is the doctrine, as stated by Judge Blatchford in the *Case of Stupp*, inapplicable to the decision of collectors in these Chinese immigration cases. On the contrary, the doctrine that the court on *habeas corpus* proceedings can only inquire into the matter of jurisdiction, has been directly applied by the federal courts to the decisions of immigration and customs officers.

*In re Day*, 27 Fed. Rep. 678.

*In re Cummings*, 32 Fed. Rep. 75.

*In re Dietze*, 40 Fed. Rep. 324.

*In re Vito Rullo*, 43 Fed. Rep. 62.

*In re Bucciarello*, 45 Fed. Rep. 463.

These immigration cases hold that, under section 2 of the act of August 3, 1882, (22 St. at Large, 214) the immigration commissioners exercise judicial functions, and therefore that the courts, in *habeas corpus* proceedings, are restricted to an inquiry into the question of the jurisdiction of the commissioner to make the order. Said section 2 of the Immigration Act

of 1882, empowers the commissioners to examine into the condition of passengers arriving in any ship or vessel, and for that purpose to go on board or through any such ship or vessel, and if, on such examination, there shall be found among such passengers any convict, &c., to report the same in writing to the collector of the port, and such person shall thereupon not be permitted to land.

Similar and equally extensive judicial powers are conferred upon collectors by the Exclusion Act of May 6, 1882, section 9 of which provides: "That before any Chinese passengers are landed from any such vessel, the collector or his deputy shall proceed to examine such passengers, comparing the certificates with the list and with the passengers; and no passenger shall be allowed to land in the United States from such vessel in violation of law."

See also, in this connection, subdivision 3 of section 2 of the act of November 3, 1893.

In *in re Day, supra*, the persons applying for the writ of *habeas corpus* had been denied a landing, after an examination by the commissioners, upon the ground that they were "unable to take care of themselves without becoming a public charge." The writ of *habeas corpus* was sought to review the finding of the commission-



ers, and to reverse their decision. Some additional facts, favorable to the petitioners, not known to the commissioners or adduced in evidence before them, were brought out on the hearing in the *habeas corpus* proceeding. Judge Brown said: "It is the business of the commissioners and not of this court, to ascertain the facts, and to determine whether or not any particular passenger comes within the provisions of the statute, so as not to be entitled to land. \* \* \*

The provisions above quoted [sec. 2 of act of Aug. 3, 1882] manifestly impose upon the commissioners the duty of determining the facts upon which the refusal of the right to land depends. The general doctrine of the law in such cases is that where the determination of the facts is lodged in a particular officer or tribunal, the decision of that officer or tribunal is conclusive and cannot be reviewed except as authorized by law. The statute of 1882 makes no provision for any review of the decision of the commissioners upon the evidence before them. No such review can therefore be had upon a writ of *habeas corpus*. That subject was elaborately considered by Blatchford, J., in the *Case of Stupp*, 12 Blatch, 501, 519, who had been held by a United States commissioner for extradition under the treaty with Belgium." [The court then states the rule as laid down by Judge Blatchford in the *Case of Stupp*.] Continuing,



Judge Brown said: "The additional evidence \* \* \* produced before me, must be submitted to the commissioners, and not passed upon by this court in the first instance. The court could not undertake to determine their sufficiency without substituting its own judgment upon the facts in place of the judgment of the commissioners. \* \* \* As the commissioners are acting clearly within their jurisdiction, and upon competent evidence, this court cannot review their determination upon *habeas corpus*."

In *in re Deitze, supra*, Judge Brown said: "All that the court has to do with the matter is to see that the proceedings in ascertaining the facts are regular and fair. \* \* This court is not the tribunal to make an original examination into the facts, but merely to see that the proceedings by the collector or other officers were fairly conducted and legally sufficient."

In *in re Vito Rullo*, Judge Brown said: "The court upon *habeas corpus* is not authorized to take evidence upon the original question as to the facts concerning the immigrant's right to land, where another tribunal of a *quasi*judicial character is constituted by law for the purpose of inquiring into such facts, and determining the imigrant's right; but the office of the writ of *habeas corpus* is to inquire into the *jurisdiction*

exercised by that tribunal, and whether it has kept within its legal limits, and proceeded according to law."

In *in re* Bucciarello, Judge Wallace said: "It follows that, if there was any competent evidence to justify a report by the superintendent of immigration or the acting superintendent that the petitioners migrated under a contract to perform labor or service, the decision of the superintendent or of his assistant is conclusive. This court cannot undertake to weigh conflicting evidence for the purpose of ascertaining whether a correct conclusion was reached."

The learned judge of the court below, in his opinion hereinbefore referred to, (Tr. p. 13) endeavors to differentiate the instant case from the last above cited cases, upon the ground that, as stated by Judge Brown in the Day case, the immigration act of August 3, 1882, makes no provision for any review of the decision of the commissioners upon the evidence before them. But neither did any of the Chinese Exclusion Acts, in force at the time of defendant's arrival at Portland, Oregon, make any provision for any review of the decision of the collector upon the evidence before him. The writ of *habeas corpus* is allowed in these Chinese cases for the purpose of inquiring into the jurisdiction of the collector. In these Chinese

cases the questions on *habeas corpus* are: 1. Was the evidence before the collector legal and competent evidence? 2. Did the facts found by the collector, in law, justify his decision denying to the applicant the right to land? and 3d: Did the collector, in his findings, confine himself to those matters upon which the statute has given him the power to exercise judicial functions and to pass judgment? In short: Did the collector have jurisdiction?

The doctrine of the above cited cases is sustained by the recent decision of the Supreme Court in the case of *Horner vs. United States*, where Blatchford, J., said:

"If an inferior court or magistrate of the United States has jurisdiction, a superior court of the United States will not interfere by *habeas corpus*."

*Horner vs. United States*, 143 U. S. 570,  
Bk. 36, L. C. P. Co., 266;

And in the still later case of *U. S. vs. Pridgeon*, Mr. Justice Jackson said:

"Under a writ of *habeas corpus* inquiry is addressed not to errors, but to the question whether the proceedings and the judgment rendered therein, are for any reason nullities."

*United States vs. Pridgeon*, 153 U. S. 63;  
Bk. 38 L. C. P. Co., 631.

The decision of the learned judge of the

court below is, in the main, based upon certain language used by Mr. Justice Blatchford in *U. S. v. Jung Ah Lung*, 124 U. S., Bk 31 L. C. P. Co., wherein Judge Blatchford said: "the question of his [the Chinaman's] title to be here can certainly be adjudicated by the proper court of the United States, upon the question of his being allowed to land." Because Judge Blatchford said that the Chinaman's *title* to be here might, under the exclusion acts, be adjudicated by the proper court of the United States, the opinion filed herein in the court below states that Judge Bellinger's judgment upon the writ of *habeas corpus* in the District Court of Oregon was an adjudication of defendant's "title to be here," and therefore not open to collateral attack in this action. But this is giving to the language of Judge Blatchford a scope of meaning directly antagonistic to the language used by the same learned jurist in *Case of Stupp*, quoted *supra*, and a meaning not warranted by the facts before the court in the *Jung Ah Lung* case. A disconnected fragment of the opinion of Judge Blatchford in the *Jung Ah Lung* case should not be taken as a key to the solution of the problem here presented. That opinion must be read in the light of the facts before the court. When so read we submit that the decision in the *Jung Ah Lung* case is in all res-

pects consistent with the position herein taken by plaintiffs in error in the instant case. The question presented to the Supreme Court in the case of Jung Ah Lung was not: What was the effect of the judgment of the court in the *habeas corpus* proceedings? Nor, what are the limits of the power exercised by the courts on *habeas corpus*? But, the question there was: Could the decision of the collector be reviewed at all on *habeas corpus*? We admit that the decision of the collector can be reviewed on *habeas corpus*, but, we say that the authority of the court in such *habeas corpus* proceeding is limited to an inquiry into the jurisdiction of the collector to decide against the Chinaman's right to land, and it will be noticed that the decision of the Supreme Court in the Jung Ah Lung case did not assail any of the findings of the collector.

Furthermore, the language used by Judge Blatchford in the Jung Ah Lung case, in which he speaks about the adjudication by the proper court of the Chinaman's title to be here, arose in this wise: The court first decided that the confinement of the Chinaman on board the vessel in which he had arrived was a restraint of his liberty, within the meaning of Section 753 of the Revised Statutes, and that, unless the exclusion acts contained a provision to the contrary, the writ should issue under said Sect-

ion of the Revised Statutes. But, counsel for the government contended that if the writ were otherwise proper under the Revised Statutes, the right to the same was taken away by the Chinese restriction acts, Judge Blatchford then quoted these acts and said that there was no provision in them that affected the jurisdiction given to the courts of the United States by said Section 753 of the Revised Statutes. "On the contrary," said Judge Blatchford, "the implication of Section 12 [of the exclusion acts] is strongly in favor of the view that the jurisdiction of the courts of the United States in the premises was not intended to be interfered with. That section provides that any Chinese person found unlawfully within the United States, shall be caused to be removed therefrom to the country from whence he came \* \* \* after being brought before some justice, judge or commissioner of the United States and found to be one not lawfully entitled to be or remain in the United States," This section of the Exclusion Act has no reference to *habeas corpus* proceedings brought to determine the lawfulness of the collector's decision denying the Chinaman permission to enter the United States. It refers to proceedings, such as were had in the instant case, brought to remove from the United States a Chinaman who has landed, and, after having so landed, is found unlawfully within the Uni-

ted States. Such a proceeding is an original proceeding. It is a proceeding directly authorized by the statute. In it the Chinaman's title to remain in the United States is put in issue. A judgement therein may, possibly, be a final adjudication of the Chinaman's right to be here, an adjudication not thereafter open to any collateral assault. In such original proceeding the court is not confined to a mere inquiry into the jurisdiction of any collector, or other *quasi* judicial tribunal. If a collector has permitted the Chinaman to land, the Commissioner or the Judge, in such original proceeding, may render a judgment directly opposed to the decision of the collector, as was decided, and correctly decided, by Judge Wellborn in *U. S. vs. Loo Way*, 68 Fed. Rep. 475. As stated above the title of the Chinaman to be here may be put in issue and adjudicated in a proceeding such as is authorized by section 12 of the Chinese restriction act. But it does not therefore follow that his title to be here is put in issue in a *habeas corpus* proceeding brought under section 753 of the revised statutes to determine the jurisdiction of the collector to make a decision denying the petitioner the right to land. The only thing there put in issue is the question of the collector's jurisdiction to make the order. Section 12 of the Exclusion Act, instead of taking away the right of *habeas corpus* given by section



753 of the revised statutes, as urged by the Government in the Jung Ah Lung case, or instead of limiting the powers of the judges or commissioners of the United States, really enlarges the powers of the judges and commissioners by empowering such judges and commissioners to order the removal of such Chinamen as are brought before them in an original proceeding upon a complaint charging the Chinamen with being unlawfully within the United States, and Judge Blatchford quoted this provision of the statute, not for the purpose of deciding the effect of a judgment rendered by a judge or a commissioner in any such original proceeding commenced thereunder, much less for the purpose of deciding the effect of a judgment on *habeas corpus*, but solely for the purpose of showing that the restriction acts, so far from abridging any of the powers of the federal judges, otherwise existing under the revised statutes, had the contrary effect, and by implication, favor the view that the jurisdiction of the courts of the United States under the *habeas corpus* statute (sec. 753, R. S.) was not intended to be interfered with, either by enlargement or by diminution. What was said by Judge Blatchford about an adjudication of the question of the Chinaman's title to be here, evidently had reference to an adjudication in an



original proceeding authorized by section 12 of the Exclusion Act, and not to any adjudication in a collateral proceeding on *habeas corpus*.

In short, the writ of *habeas corpus* in these Chinese cases, is issued under and by virtue of the *habeas corpus* statute, Sections 751-766 of the Revised Statutes, and no additional authority or jurisdiction in respect thereto is derived from the Chinese Exclusion Acts, since these acts, as stated by Judge Blatchford, were not intended to interfere with the writ of *habeas corpus*.

It follows, therefore, that the general and established rules of law governing the writ of *habeas corpus* govern the issuance of the writ in these Chinese cases in the same manner and to the same extent that they do in all other cases where the writ is issued pursuant to the provisions of Sections 751 *et seq.* of the Revised Statutes. One of these rules is that, where one is in custody under the judgment of a court or of a judicial officer, the inquiry of the court on *habeas corpus* is addressed solely to the question whether the judgment is a nullity or not. On *habeas corpus* the court passes upon the validity of the order made by the inferior court or judicial officer. It does not pass upon the question presented to and passed upon by such inferior court or officer, as, for example, the right of an immigrant to come into the United

States. The judgment of such inferior court or officer is not subject to any such collateral attack.

*Ex parte* Watkins, 3 Pet. 193;

*Ex parte* Wilson, 140 U. S., 575;

*State ex rel* Dunn vs. Noyes (Wis.) 27, L. R. A., 776.

The collector tries the validity of the Chinaman's claim to land. The court, on *habeas corpus*, tries the validity of the collector's order, in so far as the same depends upon jurisdictional matters.

We submit, therefore, that the Jung Ah Lung case is not an authority for the proposition that the title of the Chinaman to be here is put in issue, or adjudicated, in any *habeas corpus* proceeding, and that, according to an unbroken line of authorities, the only question determined on *habeas corpus* is the question of the collector's jurisdiction to make the order denying to the Chinaman permission to enter the United States.

It should be stated here that the doctrine really evoked by the learned judge of the court below, in support of his decision, is not the doctrine of *res judicata*, but the doctrine of *collateral attack*. The doctrine of *res judicata* has relation to the facts put in issue, and prohibits a re-trial of any issue of fact presented in a former action between the

same parties, or their privies, and decided by a competent tribunal. A judgment upon such facts is conclusive upon parties or privies as to such facts. The doctrine of *res judicata*, in short, relates to findings. The doctrine of collateral attack on the other hand, relates to judgments and the right or rights determined thereby. According to the doctrine of collateral attack a right or title determined by a judgment, by a proper tribunal, and in an action in which such right or title might properly be adjudicated, cannot be questioned by the parties or their privies. See Van Fleet on Collateral Attack Sec 17; *Cromwell vs. Sac County*, 94 U. S. 351.

Now we say that it is a mistake to invoke the doctrine of *res adjudicata* in support of the decision of the court below because, according to that doctrine, the decision should have been given for the plaintiffs in error. Since the only contested fact put in issue by the defendant's petition for the writ of *habeas corpus*, in the District Court of the District of Oregon, was the defendant's alleged marriage to the Portland merchant Chung Chew (Tr. p. 42). But this issue of fact was determined against the petitioner and in favor of the Government, the court holding that there had been no marriage ceremony which the

courts of this country could recognize as valid, the alleged marriage having taken place while the husband was a resident of and domiciled in the United States, and Judge Bellinger allowed the petitioner to land, not because she was the wife of Chung Chew, but because she came here honestly believing that she was the wife of Chung Chew. (Tr. p. 48). But the defendant's belief, in this respect, was not one of the facts put in issue by the petition for *habeas corpus*. Therefore, it is the doctrine of collateral attack, if any, which must be invoked and relied upon by the defendant in error. But we submit that this doctrine is not applicable, because, for the reasons given *supra*, the District Judge of Oregon, Judge Bellinger, had no jurisdiction, in the *habeas corpus* proceeding, to pass judgment upon the defendant's right or title to be here. His power was limited to an inquiry into the jurisdiction of the collector to make the order denying the petitioner the right to enter the United States. His jurisdiction began and ended with two questions: 1st. Was the evidence adduced before the collector lawful and competent? 2nd. Did the findings made by the collector, from the evidence before him, justify the collector's decision that the petitioner was not entitled to land? It was this second question that was passed upon and answered by the court in the Jung Ah Lung

case. There the collector had found from the evidence that a certificate had been issued to the Chinaman when he returned to China; that it had been stolen from him, and that he had none when he returned to the United States. The collector held, as a matter of law, that the Chinaman could not return to the United States without producing his certificate. The Supreme Court held that he could return without producing said certificate, and held, therefore, that the collector's findings of fact did not justify his judgment, and that therefore he was not authorized in making the order denying the petitioner the right to land. In so doing, the court did not try the Chinaman's title to be here; it simply passed upon the collector's jurisdiction or power to make the decision in question upon the evidence adduced before him.

The learned judge of the court below has cited authorities to support the proposition that a decision upon *habeas corpus* is *res adjudicata*. We respectfully submit, however, that these authorities are not applicable to the instant case. They are divisible into two classes: 1st. Where two or more parties voluntarily put a right or title in issue, and the court or judge passes directly upon such right or title, as, for example, where husband and wife try the title to their child's custody on *habeas cor-*

*pus*. In such case the proceeding is, in effect, transmuted into an action of claim and delivery. 2nd. The second class of cases cited in the opinion filed below, is where a person is restrained of his liberty under a void writ or a void order of commitment, *et hoc genus omne*. In such case a judgment on *habeas corpus* releasing the person from custody, is a conclusive determination of the invalidity of that particular order or writ. But it would not be a conclusive determination of the guilt or innocence of the person who may have been held under such void writ or order.

State vs. Fley, 2 Brev. 338.

In these cases it will be noticed that the court on *habeas corpus* is called upon to decide the validity of such writ or order, not to review the judgment or decision of any court or tribunal or officer clothed with judicial powers, as in the case of a collector empowered to examine Chinese passengers arriving at ports of the United States. When called upon to review the judgment or decision of such court, tribunal or judicial officer, the decision on *habeas corpus* discharging a petitioner, simply decides that the judgment or decision of such court, tribunal or judicial officer was a nullity, because such court, tribunal or judicial officer did not possess jurisdiction to make the judg-

ment or decision in question. The judgment on *habeas corpus* does not decide the guilt or innocence, rights or titles of the petitioner. If it did it would convert the writ of *habeas corpus* into a writ of error. It is not an adjudication that the person so discharged is absolutely entitled to liberty in general, and freedom from any and all restraint. It is simply an adjudication that he is entitled to be discharged from restraint under the particular void writ or void order. The judgment on *habeas corpus* would not prevent his re-arrest under a new writ or a new order. As said by Mr. Justice Story in *ex parte Milburn*, 9 Pet. 704, "A discharge of a party under a writ of *habeas corpus* from the process under which he is imprisoned discharges him from any further confinement under that process, but not under any other process which may be issued against him under the same indictment." A discharge under such void process is a final adjudication that he was at that time entitled to his liberty, *in so far as he was restrained of the same under and by virtue of that particular void process*. But it was not a final adjudication that he was at that time entitled to his liberty as against any restraint on any other process. In other words his *title to liberty* was not in issue. Only the validity of the process or order under which he was then restrained of his liberty was involved on *habeas*



*corpus*. And it is doubtless in this sense that Mr. Freeman used the language, quoted in the opinion below (Tr. p. 10) that "if \* \* \* the prisoner is discharged from custody, this is an adjudication that at that time he was entitled to his liberty."

We submit, therefore, that the authorities cited in the opinion filed in the court below, fall far short of sustaining the conclusion there reached.

In conclusion, we submit that, since Judge Bellinger's jurisdiction in the *habeas corpus* proceeding was limited to an inquiry into the jurisdiction of the collector to decide that the defendant in error was not entitled to enter the United States, the decision of Judge Bellinger is only conclusive of the fact that the collector did not have such jurisdiction, *i. e.* that it is conclusive that the findings of the collector did not authorize that officer's judgment and decision, but it was not conclusive of the petitioner's title to liberty or of her title to residence in the United States. It decided that the particular findings of the collector did not in law authorize her further detention on board the steamship *Signal*, that, and nothing more. A trial, *de novo*, of her right residence in the United States, was not authorized on *habeas corpus*.

The court had power to adjudge, on *habeas corpus*, that the reasons given by the collector



for defendant's detention in custody, did not justify such custody, but it did not have power to adjudge that there were no other reasons why she should be denied the right of entry into the United States, and by so doing try her title to residence in a collateral proceeding brought to decide the sole question as to whether the decision of the collector was anullity or not.

For the reasons above given, plaintiffs in error respectfully ask for a reversal of the judgment.

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